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14 HRB TAX GROUP, INC.  
and HRB DIGITAL LLC  
15

16 **UNITED STATES DISTRICT COURT**

17 **NORTHERN DISTRICT OF CALIFORNIA**

18 PELENATITA OLOSONI, and DEREK  
19 SNARR, on behalf of themselves, the general  
public, and those similarly situated,

20 Plaintiffs,

21 v.

22 HRB TAX GROUP, INC. and HRB  
23 DIGITAL LLC,

24 Defendants.  
25  
26  
27  
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Case No. 3:19-cv-03610-SK

**DEFENDANTS' NOTICE OF  
MOTION AND MOTION TO STRIKE**

Date: May 18, 2020  
Time: 9:30 a.m.  
Courtroom: C, 15<sup>th</sup> Floor  
Judge: Hon. Sallie Kim

1 **NOTICE OF MOTION**

2 Please take notice that on May 18, 2020, at 9:30 a.m., or as soon thereafter as the matter  
3 may be heard, before the Honorable Sallie Kim in Courtroom C, located at the San Francisco  
4 Courthouse, 450 Golden Gate Ave., San Francisco, California, HRB Tax Group, Inc. and HRB  
5 Digital LLC (“Defendants”) will and hereby do move to strike paragraphs 43 (lines 18-20), 45,  
6 54-55, 61-67, and 101-102 and all references to “Fake Free Offer,” “True Free Offer,” “Bait-and-  
7 Switch Program,” “Trick[],” and “Hijack” from the First Amended Complaint (“FAC”) of  
8 Plaintiffs Pelenatita Olosoni and Derek Snarr (“Plaintiffs”) pursuant to Federal Rule of Civil  
9 Procedure (“Rule”) 12(f).

10 This motion is based upon this Notice of Motion and Motion, the Memorandum of Points  
11 and Authorities in support thereof, all other pleadings and papers on file herein, and such other  
12 argument and evidence as may be presented to the Court.

13 **RELIEF REQUESTED**

14 Strike paragraphs 43 (lines 18-20), 45, 54-55, 61-67, and 101-102 and all references to  
15 “Fake Free Offer,” “True Free Offer,” “Bait-and-Switch Program,” “Trick[],” and “Hijack” from  
16 Plaintiffs’ FAC.

17 **STATEMENT OF ISSUE TO BE DECIDED**

18 Whether, pursuant to Rule 12(f), paragraphs 43 (lines 18-20), 45, 54-55, 61-67, and 101-  
19 102 and all references to “Fake Free Offer,” “True Free Offer,” “Bait-and-Switch Program,”  
20 “Trick[],” and “Hijack” should be stricken from Plaintiffs’ FAC.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendants bring this Motion to Strike pursuant to Rules 8(d) and 12(f), which govern  
4 what is appropriately included in a pleading and provide for striking any matter that is redundant,  
5 immaterial, impertinent, or scandalous from pleadings.

6 As shown below, Plaintiffs have now clearly defined the parameters (the who, what,  
7 when, where, and how) of their fraud claims.<sup>1</sup> Plaintiffs have defined the “when” for Plaintiff  
8 Snarr as when he performed a Google search to reach the H&R Block website on April 15, 2019,  
9 and for Plaintiff Olosoni as when she actually logged into her account on January 26, 2019.  
10 Plaintiffs have defined the “where” of their fraud claims—that is, where the misrepresentations or  
11 omissions that form the basis of their claims under California consumer protection statutes  
12 occurred—as on the Google results page, the H&R Block website, and the successive screens that  
13 Plaintiffs saw thereafter. Having so defined their fraud claims, as required by Rule 9(b), it  
14 follows that any allegations in Plaintiffs’ FAC relating to Defendants’ alleged business practices  
15 or conduct that occurred before Plaintiffs’ fraud claim began are irrelevant and immaterial to their  
16 claims.<sup>2</sup>

17 In addition to immaterial and irrelevant matters, Plaintiffs’ FAC also contains improper,  
18 prejudicial, offensive, and scandalous matters, and inflammatory and prejudicial language, that  
19 have no place in any complaint and which should be stricken under Rules 8(d) and 12(f).

20 **II. RELEVANT FACTS**

21 **A. Plaintiffs’ FAC**

22 1. Plaintiffs’ FAC is 47 pages long and contains 154 separate allegations not  
23 including multiple subparts. *See* Dkt. No. 19.

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25  
26 <sup>1</sup> There is no dispute that all of Plaintiffs’ claims sound in fraud and are subject to the  
heightened pleading standard of Rule 9(b).

27 <sup>2</sup> Defendants understand the importance and utility of a certain amount of background, but  
28 also remind the Court that Plaintiffs’ FAC consists of 154 separate allegations (not counting  
voluminous subparts) and that this Motion seeks to strike just a handful of allegations.

1           **B.       Plaintiffs’ Admissions Regarding Their Claims and Allegations in the FAC**

2           2.       Defendants moved to dismiss Plaintiffs’ FAC on December 12, 2019. Dkt.  
3 No. 62. One of the bases for that Motion to Dismiss was Plaintiffs’ failure to plead their claims  
4 brought under the California consumer protection statutes with the specificity required by Rule  
5 9(b)—that is, to plead with specificity the who, what, when, where, and how of their fraud claims.

6           3.       Plaintiffs filed their Opposition to that Motion to Dismiss on January 15,  
7 2020. Dkt. No. 69. In an effort to convince this Court that they had pled their claims with  
8 specificity, Plaintiffs’ Opposition stated:

9                   The “who” are Defendants. **The “when” is January 26, 2019 for**  
10                   **Olosoni and April 15, 2019 for Snarr. (Citations omitted). The**  
11                   **“where” consists of the landing pages within Defendants’ website**  
12                   **by which Plaintiffs accessed Defendants’ online tax preparation**  
13                   **service and the windows’ (successive screens) comprising that**  
14                   **online filing service. (Citation omitted). For Snarr, the “where”**  
15                   **also includes the Google search results page he viewed just before**  
16                   **linking to Defendants’ website. (Emphasis added).**

17                   The “what” includes Defendants’ representations to Plaintiffs that  
18                   they were not eligible for Defendants’ free filing service and  
19                   “need[ed]” to pay to file their taxes using Defendants’ online  
20                   services, and Defendants’ corresponding omissions (failing to  
21                   disclose that Plaintiffs were eligible for Defendants’ True Free File  
22                   Service and they did not need to pay Defendants to have Defendants  
23                   prepare and file their tax returns), and the resulting sales of  
24                   Defendants’ paid tax preparation services to Plaintiffs on the above  
25                   identified dates.

26           *See* Dkt. No. 69, pp. 16-17.

27           4.       In defining the specific parameters of their fraud claims, Plaintiffs further  
28           admitted that facts about things Defendants allegedly said or did not say before Plaintiff Olosoni  
29           logged into her account, or Plaintiff Snarr conducted his Google search and reached the H&R  
30           Block website, were irrelevant to their fraud claims. *Id.* at p. 6, lines 18-20; p. 18, lines 12-18.

31           **C.       Plaintiffs’ FAC Contains Prejudicial, Scandalous, Impertinent and**  
32           **Immaterial Allegations Unrelated to Their Fraud Claims**

33           5.       The FAC contains 81 paragraphs before making a single allegation about  
34           what occurred between either of the named Plaintiffs and Defendants.

6. Among those first 81 paragraphs of the FAC are allegations such as:

As explained in more detail below, among other things: (a) Defendants pay to broadly advertise their Bait-and-Switch Program on multiple platforms, in ways designed to deceive, mislead and confuse consumers about the nature and cost of Defendants' tax services and to effectively supplant Defendants' True Free File Service.

$$[\dots]$$

Defendants have paid for extensive ad campaigns on television, radio, internet and social media for Defendants' Bait-and-Switch Program.

*See* Dkt. No. 19, ¶ 43, lines 17-20, and ¶ 44.<sup>3</sup>

7. Paragraphs 61-62 of the FAC contain allegations regarding Defendants’ alleged instructions to customer service staff to “push people away from its free offering,” *id.* at ¶ 62:

H&R Block explicitly instructs its customer service staff to push people away from its free offering. In written internal guidance regarding the Free File Program, H&R Block instructs its employees as follows: “Do not send clients to this Web site unless they are specifically calling about the Free File Program. We want to send users to our paid products before the free product, if at all possible.” (Citation to ProPublica Article from May 2019).

*See id.* at ¶¶ 61-62.

8. Paragraphs 63-64 of the FAC contain allegations discussing Defendants’ alleged affiliate marketing programs for tax preparation services with third-party publishers of blogs and other websites. *See* Dkt. No. 19, ¶¶ 63-65.

63. In addition, Defendants run affiliate marketing programs or campaigns for third-party publishers of blogs and other websites. Such affiliate marketing programs encourage such publishers to promote Defendants' tax services on their website and provide links to Defendants' web pages where consumers can sign up for Defendants services. In exchange, the publishers earn a commission when such consumers use Defendants' services, particularly Defendants Paid HRB products. Through such affiliate marketing programs, Defendants provide financial incentives for third-party

<sup>3</sup> Defendants object and also move to strike herein the inflammatory, scandalous, and improper terminology of Plaintiffs' FAC, including the terms "Bait-and-Switch" and "True Free File." *See infra*, at pp. 9-10.

1 publishers to direct consumers to Defendants' Bait-and-Switch  
2 Program.

3 64. In the affiliate marketing program, the tax payer typically  
4 takes a slight detour by clicking on an article or web page published  
5 by the affiliate publisher. That article or web page (perhaps in the  
6 guise of providing a review, a recommendation, or some other  
7 information) refers to H&R Block services, may actively promote  
8 H&R Block services, and provide the link to Defendants' website.  
9 The affiliate then collects the commission for transactions in which  
10 that consumer engages while on Defendants' website.

11 *Id.* at ¶¶ 63-64; *see also id.* at ¶ 65.

12 9. Paragraphs 101-102 of the FAC contain allegations regarding Defendants'  
13 alleged lobbying activities:

14 101. To protect these illicit and inequitable profits and to maintain  
15 space in which to conduct their deceptive and unfair practices with  
16 respect to taxpayers who are entitled to free tax preparation services,  
17 Defendants have spent millions of dollars lobbying to make sure that  
18 the IRS is legally prohibited from offering their own tax preparation  
19 and filing service, which would make tax filing easy and free for  
20 most taxpayers and thereby substantially reduce Defendants' profits  
21 from their paid HRB Tax Programs.

22 102. Defendants' investment of money in such lobbying efforts  
23 shows a determination to minimize the number of people who  
24 actually file tax returns for free, and intend to continue to profit from  
25 taxpayers who should be filing for free, and thus an intent to  
26 undermine the IRS free file program.

27 *See id.* at ¶¶ 101-102. Defendants hereinafter refer to paragraphs 43 (lines 18-20), 45, 54-55, 61-67,  
28 and 101-102 as the "Immaterial Allegations."

### 29 **III. LEGAL STANDARD**

30 Rule 8(d) provides that "each allegation must be simple, concise and direct." Fed. R. Civ.  
31 P. 8(d); *see McHenry v. Renne*, 84 F.3d 1172, 1177-80 (9th Cir. 1996) (affirming violation of  
32 Rule 8 where pleading was "argumentative, prolix, replete with redundancy, and largely  
33 irrelevant"); *Harnden v. California*, 2010 WL 3489379, \*1 (N.D. Cal. Sept. 2, 2010) (noting that  
34 plaintiff's initial complaint violated Rule 8 due to its "highly inflammatory" nature). Rule 12(f)  
35 permits the Court to "strike from a pleading . . . any redundant, immaterial, impertinent, or  
36 scandalous matter." Fed. R. Civ. P. 12(f).

1 A matter is immaterial if it “has no essential or important relationship to the claim for  
2 relief or the defenses being pleaded.” *Fantasy, Inc. v. Forgerty*, 984 F.2d 1524, 1527 (9th Cir.  
3 1993), *reversed on other grounds*, 510 U.S. 517 (1994) (citation omitted). A matter is  
4 “impertinent” if it consists of statements that do not pertain to and are not necessary to the issues  
5 in question. *Id.* A matter is “scandalous” if it “improperly casts a derogatory light on someone,  
6 most typically on a party to the action.” *Cortina v. Goya Foods Inc.*, 94 F. Supp. 3d 1174, 1182  
7 (S.D. Cal. 2015).

8 The function of a Rule 12(f) motion to strike is to “avoid the expenditure of time and  
9 money that must arise from litigating spurious issues by dispensing with those issues prior to  
10 trial.” *Fantasy*, 984 F.2d at 1527 (citation omitted). California courts routinely hold that it is  
11 appropriate to strike allegations under Rule 12(f) if it will make trial less complicated or eliminate  
12 serious risk of prejudice to the moving party, delay, or confusion of the issues. *Id.* at 1527-28;  
13 *Sliger v. Prospect Mortg., LLC*, 789 F. Supp. 2d 1212, 1216 (E.D. Cal. 2011); *Nguyen v. CTS*  
14 *Elec. Mfg. Sols. Inc.*, 301 F.R.D. 337, 343 (N.D. Cal. 2014) (“The possibility that issues will be  
15 unnecessarily complicated is the type of prejudice that is sufficient to support the granting of a  
16 motion to strike.”).

17 What’s more, the claims brought by Plaintiffs under the California consumer protection  
18 statutes require reliance as an inherent and undisputed element of each claim. Courts have  
19 routinely granted motions to strike allegations contained in complaints brought under those same  
20 consumer protection statutes that are not tethered to or connected in any way to something a  
21 named plaintiff saw or relied on. For example, in *Victor v. R.C. Bigelow Inc.*, 2014 WL 1028881,  
22 at \*7 (N.D. Cal. Mar. 14 2014), the court found that while the plaintiff had alleged that he  
23 actually read the labels on the products themselves, he conceded he had never seen certain  
24 statements on the defendants’ website. Thus, the *Bigelow* court ruled that to the extent the  
25 plaintiff’s claims were premised upon alleged website misrepresentations, they were stricken. *Id.*  
26 Likewise in *Lanovaz v. Twinings N. Am., Inc.*, 2013 WL 675929, at \*4 (N.D. Cal. Feb. 25, 2013),  
27 the court struck allegations contained in the plaintiff’s complaint regarding misinformation

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1 contained on the defendant's website because the plaintiff had not alleged with specificity that  
2 she had purchased any particular product based on those website misrepresentations.

#### 3 **IV. ARGUMENT**

4 Plaintiffs have now defined for this Court the specific parameters of their fraud claims.  
5 They have told the Court when they encountered Defendants' alleged misrepresentations and  
6 omissions (January 26, 2019, for Plaintiff Olosoni, and April 15, 2019, for Plaintiff Snarr), where  
7 they encountered those misrepresentations and omissions (the H&R Block website and successive  
8 screens Plaintiffs allegedly viewed for online tax preparation, as well as the Google search results  
9 for Plaintiff Snarr), and what those misrepresentations and omissions were. Plaintiffs do not and  
10 cannot dispute that a critical element of each of their causes of action brought under the  
11 California consumer protection statutes is to show reliance upon either a material misstatement or  
12 omission. Thus, to the extent the FAC contains generalized complaints about Defendants' alleged  
13 business practices generally, that have no connection whatsoever to anything the Plaintiffs ever  
14 saw, relied on, or experienced, those allegations are per se immaterial, irrelevant, and  
15 unnecessary. Plaintiffs' FAC is chock-full of such allegations, which they themselves now admit  
16 do not, and cannot, be necessary, or relate in any way, to their purported claims.

#### 17 **A. Paragraph 43 (Lines 18-20), 45, 54-55, 61-67, and 101-102 Should All Be** 18 **Stricken as Irrelevant, Immaterial, Impertinent, and Unnecessary to** 19 **Plaintiffs' Claims**

20 Based on Plaintiffs' own admissions about the extent and scope of their fraud claims—  
21 that they encountered Defendants' alleged misrepresentations and omissions in Google search  
22 results, on the H&R Block website, and/or in successive screens in the online tax preparation  
23 process—it is undeniably true that any alleged conduct or statements by Defendants through  
24 television, radio, social media, or internet advertising (with the exception of Google search results  
25 purportedly relevant to Plaintiff Snarr) are utterly irrelevant to Plaintiffs' fraud claim here. *See*  
26 Dkt. No. 19, ¶ 43, lines 17-20, ¶ 45.

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1           The same is true with respect to Plaintiffs' generalized allegations regarding Defendants'  
2 alleged used of third-party and affiliate marketing. *Id.* at ¶¶ 63-65. There is not a single  
3 allegation in the FAC that connects either of the named Plaintiffs to having seen or read any such  
4 marketing. Indeed, Plaintiff Olosoni claims she came directly to the H&R Block website and  
5 logged in, while Plaintiff Snarr claims he conducted a Google search and clicked on a link for the  
6 H&R Block website. *Id.* at ¶¶ 86, 92-93. Thus, it is undeniably true that Plaintiffs' allegations  
7 regarding third-party and affiliate marketing have no connection whatsoever to their specific  
8 claims.

9           Likewise, there is no connection between Plaintiffs' claims and their allegations that H&R  
10 Block customer service agents were instructed to push people into paid products. *Id.* at ¶¶ 61-62.  
11 Neither Plaintiff alleges that any customer service agent ever made any misrepresentations to  
12 them, let alone pushed them into paid products.

13           And finally, it is undeniably true that Plaintiffs' assertions regarding lobbying, a  
14 constitutionally protected legislative activity, also play no role whatsoever in this case and have  
15 no connection, real or imagined, to Plaintiffs' alleged experience with H&R Block online tax  
16 preparation services. There is no allegation in the FAC that tethers these incendiary allegations  
17 about constitutionally protected activities to anything that occurred with either of the named  
18 Plaintiffs in reaching the H&R Block website and using H&R Block online tax preparation  
19 services. *Id.* at ¶¶ 101-102.

20           While Defendants are sensitive to the fact that granting motions to strike allegations are  
21 generally disfavored, the law is well-settled that when it is clear that the matter sought to be  
22 stricken has no bearing on the issues in the litigation, the motion to strike must be granted. This  
23 case is unique, akin to *Bigelow and Lanovaz*, in that Plaintiffs' own admissions establish  
24 undeniably that the Immaterial Allegations that Defendants seek to strike here fall into that  
25 category. That is, Plaintiffs themselves have conceded that the Immaterial Allegations that are  
26 the subject of this Motion are irrelevant, immaterial, and unnecessary to their claims. That is all  
27 this Court needs to grant Defendants' Motion to Strike those allegations.

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1           Moreover, although not necessary for the relief they seek, striking the Immaterial  
2       Allegations would also reduce confusion in this case and avoid the clear prejudice that will inure  
3       to Defendants if they are required to defend against allegations that have no relevance whatsoever  
4       to Plaintiffs' claims.

5           **B.       Paragraphs 61-62 and 101-102 Should Be Stricken For The Additional**  
6           **Reason That They Are Scandalous And Serve No Purpose Other Than To**  
7           **Cast Defendants In A Bad Light**

8           Paragraphs 61-62 and 101-102, which deal with Defendants' (1) alleged instructions to its  
9       customer service representatives, (2) alleged use of third-party and affiliate marketing programs,  
10      and (3) alleged lobbying activities, are not only irrelevant to the claims brought by the named  
11      Plaintiffs, but are undeniably generalized complaints about Defendants' alleged business practices  
12      that exist purely to cast Defendants in a negative light generally.

13          As noted above, these are exactly the kind of untethered, prejudicial, and scandalous  
14      allegations that courts routinely strike from complaints, particularly in cases where plaintiffs have  
15      acknowledged that the allegations have no relevance whatsoever to their specific fraud claims.

16          **C.       All References In Plaintiffs' FAC To "Fake Free Offer," "True Free Offer,"**  
17          **Or "Bait-And-Switch Program" Or To Defendants' "Trick[ing]" Or**  
18          **"Hijack[ing]" Consumers Should Be Stricken As Impertinent, Scandalous,**  
19          **And Improper**

20          Plaintiffs' entire FAC is drafted in an argumentative tone in violation of Rules 8 and 12(f).  
21      In particular, Plaintiffs created highly inflammatory, derogatory, and offensive definitions for  
22      H&R Block tax preparation services and business practices and then utilized those offensive and  
23      prejudicial terms throughout the FAC. Among the most inflammatory of those terms are the  
24      terms "Fake Free Offer," which Plaintiffs use to define the H&R Block online tax preparation  
25      service known as H&R Block Free Online. Plaintiffs also use the term "True Free Offer" to refer  
26      to the IRS Free File program delivered by H&R Block. Plaintiffs' FAC repeatedly refers to  
27      Defendants' alleged "Bait-and-Switch Program," which is a defined term that is put into  
28      quotations in paragraph 5 of the FAC. That term, on its face, is highly inflammatory and

1 improper. These three prejudicial and offensive terms are then utilized repeatedly over and over  
2 again by Plaintiffs, infecting nearly every allegation of the FAC. In addition, peppered  
3 throughout Plaintiffs' FAC are references to Defendants "trick[ing]" or "hijack[ing]" taxpayers  
4 through their alleged business practices. *See* Dkt. No. 19, ¶¶ 51, 79; *see also* titles throughout  
5 FAC at p. 11, lines 3-4, and p. 21, lines 1-2. Such terms have no place in a pleading under Rule  
6 8(d). These terms and the general tenor of the FAC, which reads like a highly prejudicial closing  
7 argument, add nothing of factual value or substance to Plaintiffs' claims, but rather are clearly  
8 included in the FAC for dramatic affect and solely to cast Defendants in a bad light. These are  
9 exactly the kinds of allegations that Rule 8(d) prohibits and 12(f) mandates must be stricken from  
10 a complaint. In fact, the entire reason for Rule 8(d) and 12(f) existing is to advise courts on what  
11 is properly contained in a complaint and what is not. Plaintiffs' FAC, with its use of these highly  
12 inflammatory terms, is exactly the kind of complaint that Rule 12(f) was written to prohibit.

13 As such, Defendants respectfully request that the Court also strike from Plaintiffs' FAC  
14 any references to the terms "Fake Free Offer," "True Free Offer," or "Bait-and-Switch Program,"  
15 or to Defendants "trick[ing]" or "hijack[ing]" taxpayers through their alleged business practices.

## 16 **V. CONCLUSION**

17 Wherefore, Defendants respectfully request that this Court strike from Plaintiffs' FAC the  
18 following:

- 19 • Paragraphs 43 (lines 18-20), 45, 54-55, 61-67 and 101-102,
- 20 • All references to "Fake Free Offer," "True Free Offer," "Bait-and-Switch  
Program," "Trick[]" or "Hijack,"

21 and for all other relief this Court deems just and proper.

22 Dated: April 7, 2020

Respectfully submitted,

23 JONES DAY

24 By: /s/ Darren K. Cottriel  
25 Darren K. Cottriel

26 Attorneys for Defendants  
27 HRB TAX GROUP, INC.  
28 and HRB DIGITAL LLC